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NECESSITY DEFENSE TO FELON-IN-POSSESSION CHARGES: THE THIRD CIRCUIT JUSTIFIES A FEDERAL JUSTIFICATION DEFENSE IN *VIRGIN ISLANDS v. LEWIS*

KATHRYN MAZA*

"Necessity introduces a privilege with respect to private rights."[1]

I. INTRODUCTION TO THE UTILITY OF JUSTIFICATION

If the law says that a man shall not spill blood in the streets, it certainly does not apply to the surgeon who rushes to aid a stricken man.[2] Common sense further approves that the statute against prison escape does not extend to a prisoner who breaks out when the prison is on fire, "for he is not to be hanged because he would not stay to be burnt."[3] In *United States v. Kirby*,[4] the Supreme Court observed:

> All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. *It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character.* The *reason of the law* in such cases should prevail over its *letter*.[5]

At its foundation, modern criminal law embodies principals of utilitarianism, punishing conduct based on conceptions of morality and justice

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1. FRANCIS BACON, THE ELEMENTS OF THE COMMON LAWES OF ENGLAND 29 (Garland Publ'g 1978) (1630). Francis Bacon's original quote, written in Latin, reads "*[n]ecessitas inducit privilegium quoad iura private.*" *Id.* Bacon continues:

> The law chargeth no man with default where the act is compulsory, and not voluntary, and where there is not a consent and election; and therefore if either there be an impossibility for a man to do otherwise, or so great a perturbation of the judgment and reason as in presumption of law man's nature cannot overcome, such necessity carrieth a privilege in itself.

Id. at 30. For further discussion of the compilation of Bacon's work, and the Latin-to-English translation, see Michael H. Hoffheimer, *Codifying Necessity: Legislative Resistance to Enacting Choice-of-Evils Defenses to Criminal Liability*, 82 TUL. L. REV. 191, 201 (2007).

2. *See* United States v. Kirby, 74 U.S. (7 Wall.) 482, 486-87 (1868) (advocating sensible construction of law). For Supreme Court commentary on reasonable legal interpretation, see *infra* note 52.

3. *See id.* at 487 (exemplifying when declining to apply law may have merit).

4. 74 U.S. (7 Wall.) 482 (1868).

5. *Id.* at 486-87 (emphases added).

in order to maximize social welfare.[6] Classic utilitarian theorist Jeremy Bentham suggested that "the general object which all laws have . . . is to augment the total happiness of the community."[7] Further, the moral worth of human action is forward-looking, and determined by its outcome.[8] Thus, criminal punishment is inutile, "outweighed," and "groundless" when targeting conduct necessary to produce a lesser evil upon society.[9]

Our tripartite system of government, predicated upon legislative supremacy, commands that federal courts act as faithful agents of Congress, discerning and implementing legislative "intent."[10] Yet, theorists and courts alike have repeatedly recognized that judges should depart from the statutory text where a literal application would produce "absurd" results.[11] The common law justification defense of necessity, or choice of evils, is one such mechanism that effectuates utilitarian goals

6. *See generally* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 14-19 (5th ed. 2009) (describing predominant theories underlying criminal law and punishment); Melissa Beach, Note, *"When Mercy Seasons Justice"*, 23 ST. JOHN'S J. LEGAL COMMENT. 887 (2008) (discussing utilitarian influence on criminal justice system and examining theories of punishment: rehabilitation, deterrence, incapacitation, and retribution).

7. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, *reprinted in* 1 THE WORKS OF JEREMY BENTHAM 1, 83-84 (John Bowring ed., Adamant Media Corp. 2005) (1859).

8. *See* JEREMY BENTHAM, PRINCIPLES OF PENAL LAW, *reprinted in* 1 THE WORKS OF JEREMY BENTHAM, *supra* note 7, at 365, 396 ("If the apparent magnitude, or rather value of that pain be greater than the apparent magnitude or value of the pleasure or good he expects to be the consequence of the act, he will be absolutely prevented from performing it.").

9. *See* BENTHAM, *supra* note 7, at 84 (commenting on propriety of punishment). Bentham suggests that punishment is "groundless":

> Where the mischief was *outweighed*: although a mischief was produced by that act, yet the same act was necessary to the production of a benefit which was of greater value than the mischief. This may be the case with any thing that is done in the way of precaution against instant calamity . . . .

Id.

10. *See, e.g.*, Philbrook v. Glodgett, 421 U.S. 707, 713 (1975) ("Our objective . . . is to ascertain the congressional intent and give effect to the legislative will."), *superseded by statute*, 42 U.S.C. § 607(a) (2006), *as recognized in* Batterton v. Francis, 432 U.S. 416 (1977); United States v. Am. Trucking Ass'ns, 310 U.S. 534, 542 (1940) ("In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress."); Interstate Commerce Comm'n v. Baird, 194 U.S. 25, 38 (1904) ("The object of construction, as has been often said by the courts and writers of authority, is to ascertain the legislative intent, and, if possible, to effectuate the purposes of the lawmakers."); *see also* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2394 (2003) (discussing judiciary's duty to follow Congress's intent).

11. *See* Manning, *supra* note 10, at 2388 (introducing "absurdity doctrine" and citing early case law as support) (citing Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 203 (1819); United States v. Bright, 24 F. Cas. 1232, 1235 (C.C.D. Pa. 1809))); *see also* Cass R. Sunstein, *Problems with Rules*, 83 CAL L. REV. 953, 986 (1995) (arguing that "meaning of the rule [of law] is determined by moral and political judgments at the point of application"). In *Bright*, the court observed:

of penal theory: necessity seeks to prevent an absurd application of criminal law by absolving liability where an actor violates the letter of the law to produce the lesser of two evils.[12] Federal courts have been confronted with justification defenses to a broad variety of charges, including prison escape,[13] medical necessity of marijuana,[14] other drug-related offenses,[15] civil disobedience,[16] and felon in possession of a

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> In most cases it will be found that the soundest and safest rule by which to arrive at the meaning and intention of a law is to abide by the words which the lawmaker has used. If he has expressed himself so ambiguously that the plain interpretation of the words would lead to absurdity, and to a contradiction of the obvious intention of the law, a more liberal course may be pursued.

Bright, 24 F. Cas. at 1235.

12. For a discussion of the necessity defense, see *infra* notes 27-45 and accompanying text.

13. *See, e.g.*, United States v. Lopez, 885 F.2d 1428, 1430 (9th Cir. 1989) (claiming necessity defense against prison escape charge), *overruled on other grounds*, Schmuck v. United States, 489 U.S. 705 (1989); United States v. Garza, 664 F.2d 135, 140-41 (7th Cir. 1981) (same); Op-Ed., *"Rescue" Defense May Not Fly*, SAN JOSE MERCURY NEWS, Jan. 17, 1987, at 2B (discussing planned necessity defense to prison escape charge).

14. *See, e.g.*, Raich v. Ashcroft, 352 F.3d 1222, 1224 (9th Cir. 2003) (acknowledging defendant had satisfied requirements for medical necessity argument), *vacated on other grounds sub nom.*, Raich v. Gonzales, 545 U.S. 1 (2005); *see also* Eric Bailey, *Patient Loses Appeal on Medical Marijuana*, L.A. TIMES, Mar. 15, 2007, at 4 (discussing ultimate failure of medical necessity defense in *Raich*); Linda Greenhouse, *Justices Set Back Use of Marijuana to Treat Sickness*, N.Y. TIMES, May 15, 2001, at A1 (same).

15. *See, e.g.*, United States v. Posada-Rios, 158 F.3d 832, 874-75 (5th Cir. 1998) (addressing necessity defense to cocaine distribution charges, ultimately finding defense unavailable because defendant did not demonstrate lack of legal alternatives to dealing illegal drugs); Mike McKee, *Is Necessity the Mother of Prevention?*, RECORDER (San Francisco), Apr. 5, 1993, at 1 (discussing planned necessity defense to possession of hypodermic needles).

16. *See, e.g.*, United States v. Schoon, 971 F.2d 193, 195 (9th Cir. 1991) (finding necessity defense unavailable as matter of law in civil disobedience case that involved protesting U.S. involvement in El Salvador and obstructing IRS activities); United States v. Seward, 687 F.2d 1270, 1275 (10th Cir. 1982) (denying necessity defense to criminal trespass on nuclear energy plant site while protesting); United States v. Cassidy, 616 F.2d 101, 102 (4th Cir. 1980) (finding necessity defense unavailable, because legal alternatives existed, where defendants threw blood and ashes on walls of Pentagon protesting against nuclear weapons program); United States v. Mowat, 582 F.2d 1194, 1208 (9th Cir. 1978) (denying necessity defense to unlawful entry charge where defendants trespassed on military reservation allegedly to protect land from impending target bombing); United States v. Simpson, 460 F.2d 515, 518 (9th Cir. 1972) (declining to apply necessity defense to destruction of Vietnam draft card); Kirk Johnson, *Legal Cost for Throwing Monkey Wrench into the System*, N.Y. TIMES, Oct. 10, 2009, at A11 (discussing district court's rejection of necessity defense where defendant disrupted federal oil rig to prevent global warming). Specifically, courts have held that because an individual may appeal to the political process, as a matter of law a civil disobedience necessity defense must fail. *See, e.g.*, *Schoon*, 971 F.2d at 198-99 (finding where claimed harm is merely existence of law or policy, elements of necessity are never satisfied because "petitioning Congress to change a policy is *always* a legal alternative"); United States v. Dorrell, 758 F.2d 427, 432 (9th Cir. 1985) ("[T]he law should [not] excuse crimi-

firearm.[17] Yet, until recently, no federal court had officially recognized a federal justification defense.[18]

This Casebrief explains how the Third Circuit, in *Virgin Islands v. Lewis*,[19] faithfully exercised its judicial duty by recognizing the availability of a narrow federal justification defense to a felon-in-possession-of-a-firearm charge, ultimately preventing an otherwise absurd application of the law.[20] Part II of this Casebrief discusses the common law origins and modern application of a justification defense.[21] Part III summarizes Supreme Court necessity defense jurisprudence.[22] Part IV introduces the Third Circuit's justification doctrine.[23] Part V explains the propriety of the Third Circuit's approach.[24] Part VI provides practical guidance for Third Circuit practitioners.[25] Part VII concludes with a discussion of the circuit proliferation of a federal justification defense.[26]

II. THE JUSTIFICATION DEFENSE OF NECESSITY

Necessity is a defense rooted in the common law.[27] Nevertheless, recent applications of necessity have combined the common law defenses of

nal activity intended to express the protestor's disagreement with positions reached by the lawmaking branches of the government."); *see also* United States v. Bailey, 444 U.S. 394, 411 (1980) (noting that "if there was a reasonable, legal alternative to violating the law, . . . the defenses will fail").

17. *See* Ron Krauss, *In Trial for Unlawful Firearm Possession, Lack of Jury Instruction on Affirmative Defense of Justification Not Plain Error*, THIRD CIRCUIT BLOG (Sept. 29, 2010), http://circuit3.blogspot.com/2010/09/in-trial-for-unlawful-possession-of.html (describing application of justification defense to unlawful-possession-of-firearm case). For a discussion of circuit court treatment of the justification defense to federal felon-in-possession-of-a-firearm cases, see *infra* notes 88-114, 133-40, and accompanying text.

18. *See generally* Virgin Islands v. Lewis, 620 F.3d 359 (3d Cir. 2010) (recognizing federal justification defense); United States v. Paolello, 951 F.2d 537 (3d Cir. 1991) (same).

19. 620 F.3d 359 (3d Cir. 2010).

20. For a discussion of the propriety of the Third Circuit approach, see *infra* notes 115-46 and accompanying text.

21. For a discussion of the origins and modern application of the necessity defense, see *infra* notes 27-45 and accompanying text. For the purposes of this article, "justification," "necessity," and "choice-of-evils" defenses are interchangeable. For a historical perspective on the consolidation of these defenses, see *infra* notes 27-29 and accompanying text.

22. For a discussion of Supreme Court necessity jurisprudence, see *infra* notes 46-84 and accompanying text.

23. For a discussion of the Third Circuit's justification doctrine, see *infra* notes 85-114 and accompanying text.

24. For a discussion of the validity of the Third Circuit's justification defense, see *infra* notes 115-46 and accompanying text.

25. For a discussion of practitioner issues, see *infra* notes 147-71 and accompanying text.

26. For a discussion suggesting that the Third Circuit has set the justification standard, see *infra* notes 172-77 and accompanying text.

27. For a discussion of the common law background of necessity, see *infra* notes 30-38 and accompanying text.

necessity and duress into a single modern justification defense.[28] Thus, necessity today is codified under the rubric of necessity, "choice of evils," or justification.[29]

A. *Common Law, Common Sense*

The common law recognized a necessity defense to serve broader utilitarian policy goals of fair and just application of the laws.[30] This defense typically applied where an actor in an emergency situation was faced with a choice of two evils: violate the letter of the law and produce a less harmful result, or comply with the law and allow greater harm to occur.[31]

Most scholars agree that necessity belongs to the justification category of defenses.[32] Necessity operates as "a supplement to legislative judgment."[33] Based on the assumption that lawmakers would have authorized certain conduct if it had been contemplated in advance, necessity legitimizes technically unlawful actions where "common sense, principles of justice, [and] utilitarian considerations" render such conduct justifiable.[34] Thus, a prisoner who flees a burning prison may be justified by necessity and therefore not guilty of otherwise unlawful prison escape.[35]

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28. For a discussion of the consolidation of traditional necessity and duress into one modern defense, see *infra* notes 39-45 and accompanying text.

29. For a discussion of the modern application of necessity, see *infra* notes 42-45 and accompanying text.

30. *See* WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW 116-21 (2d ed. 2003) (describing generally applicability of necessity at common law). For further discussion of the history and current status of necessity, see GEORGE FLETCHER, RETHINKING CRIMINAL LAW § 10.2 (1978); GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART §§ 229-39 (2d ed. 1961); Edward B. Arnolds & Norman F. Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 J. CRIM. L. & CRIMINOLOGY 289 (1974); P.R. Glazebrook, *The Necessity Plea in English Criminal Law*, 30 CAMBRIDGE L.J. 87 (1972); John T. Parry, *The Virtue of Necessity: Reshaping Culpability and the Rule of Law*, 36 HOUS. L. REV. 397 (1999); Rollin M. Perkins, *Impelled Perpetration Restated*, 33 HASTINGS L.J. 403 (1981); Lawrence P. Tiffany & Carl A. Anderson, *Legislating the Necessity Defense in Criminal Law*, 52 DENV. L.J. 839 (1975).

31. *See* LAFAVE, *supra* note 30, at 126-29 (explaining balancing-of-evils social policy rationale).

32. *See id.* at 116 (categorizing necessity as justification defense). Specifically, one scholar has characterized necessity as a "residual justification defense," or a "defense of last resort." DRESSLER, *supra* note 6, at 290.

33. DRESSLER, *supra* note 6, at 290.

34. *Id.* (explaining necessity).

35. *See id.* at 289 (discussing application of necessity). Dressler characterizes a successful invocation of necessity as operating where an individual is faced with a "dilemma: as a result of some natural (non-human) force or condition, he must choose between violating a *relatively minor* offense, on the one hand, and suffering (or allowing others to suffer) *substantial harm* to person or property, on the other hand." *Id.* For further discussion of the legal requirements of necessity in prison escape cases, see *infra* notes 53-65 and accompanying text.

Traditionally, necessity required that exigent circumstances come from physical forces of nature, such as a storm.[36] The related defense of duress, usually categorized as an excuse defense, applied in situations where the pressure exerted came from human beings.[37] Nevertheless, modern case law has "blur[red] the distinction."[38]

B. *Modern Day Codification*

The Model Penal Code (MPC) codified necessity and duress in a single "choice-of-evils" defense.[39] The MPC declines to penalize otherwise criminal actions—caused by either natural or human forces—where the actor seeks to prevent a greater harm and the legislature has not precluded the defense.[40] The defense is unavailable, however, if the actor was negligent or reckless in causing the situation.[41]

Modern state law typically consolidates common law precedent.[42] Some state statutes recognize the original necessity defense.[43] Other

36. *See* LAFAVE, *supra* note 30, at 116 (explaining causal forces for necessity defense).

37. *See id.* at 121 (providing traditional definition of duress); *see also* DRESSLER, *supra* note 6, at 291-93 (discussing necessity). For a discussion of courts' treatment of duress and necessity, see *infra* notes 60-61 and accompanying text.

38. United States v. Bailey, 444 U.S. 394, 410 (1980).

39. *See* MODEL PENAL CODE § 3.02 (1985) (codifying choice-of-evils defense). Section 3.02 states:

> (1) Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:
>
> (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
>
> (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
>
> (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.
>
> (2) When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this Section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

Id.

40. *See id.* (detailing first prong).

41. *See id.* (providing second prong).

42. *See* United States v. Perez, 86 F.3d 735, 736 (7th Cir. 1996) (noting that, in felon-in-possession case, theoretical underpinnings favor treating duress and necessity under rubric of "justification"); *see also* United States v. Alston, 526 F.3d 91, 94 n.3 (3d Cir. 2008) (observing that ease of use favors treating duress, necessity, and self-defense in felon-in-possession case under single, unitary rubric of justification); United States v. Leahy, 473 F.3d 401, 403 (1st Cir. 2007) (finding justification defense to felon-in-possession-of-firearm charge encompasses duress and necessity).

43. *See* Hoffheimer, *supra* note 1, at 236-42, 244 (recognizing states that follow common law approach).

states, however, have codified the MPC choice-of-evils defense.[44] Nevertheless, modern defenses absolve otherwise criminal conduct based on the traditional utilitarian rationale that such behavior is justifiable where necessary to prevent a greater societal wrong.[45]

III. THE SUPREME COURT PRESUMES A FEDERAL NECESSITY DEFENSE

Unlike most state legislatures, Congress has considered, but has never enacted, a federal necessity defense.[46] Thus, federal courts have addressed the necessity defense as a matter of federal common law.[47] Although the Supreme Court has not squarely addressed the issue, the following cases presume a federal necessity defense and provide some guidance regarding the defense's application.[48]

In *Baender v. Barnett*,[49] the Court affirmed that federal laws should be interpreted in light of common law jurisprudence to protect against unfair punishment.[50] The *Baender* Court reasoned that federal criminal statutes, though general in their words, "are to be taken in a reasonable sense, and not in one which works manifest injustice."[51] Citing common law precedent, the Court noted that such "sensible construction" of federal criminal laws—notwithstanding, for example, a federal law prohibiting prison es-

44. *See id.* at 234-35, 244 (discussing states that have adopted MPC approach).

45. *See id.* at 234-42 (explaining policy rationale).

46. *See id.* at 232-34 (describing failed attempts to codify necessity defense in federal criminal law).

47. For a discussion of Supreme Court jurisprudence regarding a federal necessity defense, see *infra* notes 46-84 and accompanying text. For a discussion of circuit court jurisprudence regarding a federal necessity defense, see *infra* notes 130-36 and accompanying text.

48. For a discussion of Supreme Court necessity jurisprudence, see *infra* notes 46-84 and accompanying text.

49. 255 U.S. 224 (1921).

50. *See id.* at 225-26 (opining that statutes "are to be taken in a reasonable sense, and not in one which works manifest injustice or infringes constitutional safeguards" and deferring to "rule of construction recognized in repeated decisions of this and other courts"). In *Baender*, the Supreme Court interpreted the statutory language of 18 U.S.C. § 487, criminalizing the unauthorized possession of "any die in the likeness or similitude of a die designated for making genuine coin of the United States." *Id.* at 226. In the indictment, the United States charged the defendant with "'willfully, knowingly,' and without lawful authority" possessing dies prohibited by federal law. *See id.* at 225 (recounting indictment). At trial, the defendant argued that § 487 violates the Due Process Clause of the Fifth Amendment because the statute unjustly criminalizes possession "neither willing nor conscious." *Id.* (providing defendant's argument). The district court, however, upheld § 487 and interpreted the statutory language to require "'a willing and conscious possession.'" *Id.* (reviewing procedural posture of case). The Supreme Court affirmed the district court's canon of statutory interpretation and reasoned that "[i]n so holding we but give effect to a cardinal rule of construction recognized in repeated decisions of this and other courts." *Id.* at 226.

51. *Id. at 226.*

cape—would "'not extend to a prisoner who breaks out when the prison is on fire.'"[52]

Following *Baender*, in the seminal case *United States v. Bailey*,[53] the Supreme Court addressed common law defenses to federal law.[54] In *Bailey*, the United States charged the defendants with prison escape.[55] The de-

52. *Id.* (quoting Unites States v. Kirby, 74 U.S. (7 Wall.) 482, 486 (1868)). In support, the Court cited prior case law:

> In *Margate Pier Co. v. Hannam*, Abbot, C.J., quoting from Lord Coke, said: "Acts of Parliament are to be so construed, as no man that is innocent, or free from injury or wrong, be by a literal construction punished or endamaged."
>
> In *United States v. Kirby*, this court said:
>
> All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. *It will always, therefore, be presumed that the Legislature intended exceptions to its language, which would avoid results of this character.* The *reason of the law* in such cases should prevail over its *letter.* The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law, which enacted 'that whoever drew blood in the streets should be punished with the utmost severity,' did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling, cited by Plowden, that the statute of 1 Edward II, which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire—for he is not to be hanged because he would not stay to be burnt.
>
> And in *United States v. Jin Fuey Moy*, we said: "a statute must be construed, if fairly possible, so as to avoid, not only the conclusion that it is unconstitutional, but also grave doubts upon that score."

Id. (emphases added) (citations omitted).

53. 444 U.S. 397 (1980).

54. *See id.* at 397 (reviewing availability of necessity or duress as defense to federal criminal statute).

55. *See id.* (discussing charges against defendants). In *Bailey*, the Government charged the defendants with violating both federal and District of Columbia statutes proscribing escape from prison. *See id.* at 396-97 (detailing charges). Federal law provides:

> Whoever escapes or attempts to escape from the custody of the Attorney General or his authorized representative, or from any institution or facility in which he is confined by direction of the Attorney General, or from any custody under or by virtue of any process issued under the laws of the United States by any court, judge, or magistrate judge, or from the custody of an officer or employee of the United States pursuant to lawful arrest, shall, if the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense, be fined under this title [not more than $5,000] or imprisoned not more than five years, or both; or if the custody or confinement is for extradition . . . or by virtue of an arrest or charge of or for a misdemeanor, and prior to conviction, be fined under this title [not more than $1,000] or imprisoned not more than one year, or both.

18 U.S.C. § 751(a) (2006).

The District of Columbia penal code provides:

> (a) No person shall escape or attempt to escape from:

fendants argued defenses of necessity and duress.[56] The district court, however, denied the defendants' request for jury instructions on those defenses, finding that the defendants had failed as a matter of law to satisfy the prerequisite showing of attempted surrender following escape.[57] A

> (1) Any penal institution or facility in which that person is confined pursuant to an order issued by a court, judge, or commissioner of the District of Columbia;
> (2) The lawful custody of an officer or employee of the District of Columbia or of the United States; or
> . . . .
> (b) Any person who violates subsection (a) of this section shall be fined not more than $5,000 or imprisoned not more than 5 years, or both, said sentence to begin, if the person is an escaped prisoner, upon the expiration of the original sentence . . . .

22 D.C. CODE § 22-2601 (2001). In *Bailey*, at approximately 5:35 a.m. on August 26, 1976, defendants Clifford Bailey, James T. Cogdell, Ronald C. Cooley, and Ralph Walker escaped from the District of Columbia jail by crawling through a window and sliding down a knotted bed sheet. *See Bailey*, 444 U.S. at 396-98 (describing escape). The defendants remained at large for periods ranging from one month to three-and-one-half months, until apprehended individually between September 27, 1976, and December 13, 1976. *See id.* (describing apprehension).

56. *See Bailey*, 444 U.S. at 398 (summarizing defendants' claims). The defendants described the conditions in jail from June to August 1976 to include frequent fires in "Northeast One," their maximum-security cell block, as well as threats and beatings. *See id.* (explaining jail conditions). On review, in construing the evidence most favorably to the defendants, the Court summarized:

> [T]his evidence demonstrated that the inmates of Northeast One, and on occasion the guards in that unit, set fire to trash, bedding, and other objects thrown from the cells. According to the inmates, the guards simply allowed the fires to burn until they went out. Although the fires apparently were confined to small areas and posed no substantial threat of spreading through the complex, poor ventilation caused smoke to collect and linger in the cellblock.
>
> [Defendants] Cooley and Bailey also introduced testimony that the guards at the jail had subjected them to beatings and to threats of death. Walker attempted to prove that he was an epileptic and had received inadequate medical attention for his seizures.

Id.

57. *See id.* (explaining district court ruling). The district court concluded the defendants did not meet their burden of production in showing an attempt to surrender following their escape. *See id.* at 398-99 (reviewing district court's decision). Defendant Cooley, who remained at large for one month, testified his "people" tried to contact the police, but "never got in touch with anybody." *Id.* at 399 (internal quotation marks omitted). Defendant Bailey, who remained at large until November 19, 1976, testified that he "had the jail officials called several times," but declined surrender because he "would still be under the threats of death." *Id.* (internal quotation marks omitted). Cooley concurred with Bailey's further testimony that "the FBI was telling my people that they was going to shoot me." *Id.* (internal quotation marks omitted). Defendant Walker testified he had attempted to negotiate surrendering to the FBI. *See id.* (recounting defendant's testimony). Walker claimed that he spoke three times to an agent whose name he could not recall, and that despite the agent's reassurances he would not be harmed upon surrender, the agent could not promise he would not be returned to the District of Columbia jail. *See id.* (discussing defendant's evidence of attempt to surrender). *But see id.* at 398 n.2 (noting, in rebuttal, prosecution called FBI agent Joel Dean, assigned to Walker's escape case, who testified that under standard bureau prac-

divided court of appeals reversed, with the majority holding that the district court erred in denying the jury evidence of "coercive conditions" when determining whether the defendants had formed the requisite criminal intent.[58]

While the Supreme Court ultimately reversed the appellate court's decision, it discussed the possibility of duress or necessity defenses.[59] The Court explained that, at common law, duress typically applied to excuse actions based on coercion from other humans, where necessity addressed natural causes beyond the actor's control rendering criminal conduct "the lesser of two evils."[60] The Court also noted, however, "[m]odern cases have tended to blur the distinction between duress and necessity."[61]

Even so, the Court refrained from defining the "precise contours" of a federal duress or necessity defense.[62] More narrowly, the Court held that—in the context of prison escape cases—the defendant must support such a defense by showing that "given the imminence of the threat," violating the law was "his only reasonable alternative."[63] Further, the defendant must justify not only his initial escape, but also his continued failure to turn himself in to authorities.[64] Ultimately, the Court upheld the denial

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tice, he would have been notified of any contact and was never informed of any attempt). Thus, the district court denied the defendants' requested jury instruction. *See id.* at 399-400, 400 n.3 (describing district court's decision). Rather, the court instructed the jury to disregard any evidence of conditions in the jail. *See id.* at 400 (indicating district court's instruction to jury). The jury convicted the defendants of violating § 751(a). *See id.* (discussing findings). Upon the same evidentiary deficiency in a subsequent trial, defendant Cogdell was likewise denied admission of evidence on prison conditions, and a jury convicted Cogdell of violating § 751(a). *See id.* (summarizing jury verdicts).

58. *See id.* at 400-01 (holding that prisoner escaping to avoid "non-confinement" conditions, including beatings or homosexual attacks, qualifies as § 751(a) criminal "intent to avoid confinement" (internal quotation marks omitted)).

59. *See id.* at 401-17 (discussing burden of establishing requisite *mens rea* under federal criminal law and explaining possible common law defenses). For further analysis of the Court's holding, see *infra* notes 60-65 and accompanying text.

60. *See id.* at 409-10 (reviewing common law distinction between duress and necessity).

61. *Id.* at 410.

62. *See id.* at 410-11 (confining ruling to specific facts of case).

63. *Id.* at 411.

64. *See id.* (noting duration of offense). The Court read § 751(a) as criminalizing both initial prison escapes as well as failures to return to custody. *See id.* at 413 (discussing elements of § 751(a)). Moreover, the Court characterized the failure to return as a continuing offense. *See id.* (considering nature of offense). The Court noted that, while jurors are typically the judges of credibility of testimony offered by witnesses, in an affirmative defense the defendants bear the preliminary threshold burden of presenting sufficient evidence to the federal judge to warrant jury presentment on the issue of an attempted surrender to authorities. *See id.* at 414, 416 (reviewing preliminary relevance threshold). Finding the defendants' "[v]ague and necessarily self-serving statements . . . as to future good intentions or ambiguous conduct" insufficient, the Court concluded that it was unnecessary to decide whether defendants' preliminary showing of coercion justifying their initial

of jury instructions on a necessity defense because the defendants failed to offer sufficient evidence of a "bona fide effort to surrender . . . as soon as the claimed duress or necessity had lost its coercive force."[65]

Two decades later, in *United States v. Oakland Cannabis Buyers' Cooperative*,[66] the Court again side-stepped the issue of a broadly available necessity defense under federal law.[67] The defendants—a not-for-profit cooperative of "medical cannabis dispensaries"—openly violated a district court injunction by providing marijuana to qualifying individuals, claiming that such distributions were medically necessary.[68] The Supreme Court held that medical necessity is not a defense to manufacturing and distributing marijuana, as prohibited by the Controlled Substances Act (CSA).[69] While regarding a federal necessity defense an "open question," the Court reasoned that the language and structure of the CSA specifically precluded such a defense.[70] The Court concluded that a necessity defense could never succeed where, as in that case, "the legislature itself has made a 'determination of values.'"[71]

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departure was sufficient to warrant a jury instruction. *See id.* at 415 (holding that defendants were not entitled to instruction on defense theories).

65. *Id.* at 413.

66. 532 U.S. 483 (2001).

67. *See id.* at 492 (declining to recognize category of medical necessity defense).

68. *See id.* at 486-87 (summarizing facts of case). This case arose out of marijuana sales following the enactment of a California voter initiative called the Compassionate Use Act of 1996. *See id.* at 486 (providing facts of case). The act sought "'[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes.'" *Id.* (quoting CAL. HEALTH & SAFETY CODE § 11362.5 (West Supp. 2001)).

69. *See id.* at 492 ("We need not decide . . . whether necessity can ever be a defense when the federal statute does not expressly provide for it. . . . [W]e need only recognize that a medical necessity exception for marijuana is at odds with the terms of the Controlled Substances Act.").

70. *See id.* at 491 (examining Controlled Substance Act). The Controlled Substance Act states: "Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . ." 21 U.S.C. § 841(a)(1) (2006). The Court noted a specific exception established by the act, exempting government-approved research projects. *See Oakland Cannabis Buyers' Cooperative*, 532 U.S. at 490 (referencing 21 U.S.C. § 823(f)). The Court held that the cooperative did not fit within the exemption. *See id.* (determining that defendant could not claim exemption). Further, the Court reasoned that, although not expressly precluding the defense, Congress made clear a necessity "defense is unavailable." *See id.* at 491 (rejecting necessity defense). The Court concluded that by placing marijuana on the list of Schedule I—the most restrictive schedule, including only drugs with "'no currently accepted medical use in treatment in the United States,'" with "'a high potential for abuse,'" and having "'a lack of accepted safety for use . . . under medical supervision'"—Congress made the determination that marijuana did not warrant a medical exception. *Id.* at 492 (quoting 21 U.S.C. § 812(b)(1)(A)-(C)).

71. *Id.* at 491 (quoting 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 5.4, at 629 (2d ed. 1986)).

Finally, in *Dixon v. United States*,[72] the Court implicitly addressed common law defenses to federal criminal law.[73] In *Dixon*, the defendant had been convicted of receiving a firearm while under indictment.[74] She argued that she acted under duress because her boyfriend threatened to hurt her or kill her children if she did not buy guns for him.[75] On appeal, she challenged that the Government must prove the absence of duress beyond a reasonable doubt.[76] The Fifth Circuit rejected the defendant's claim, and the Supreme Court granted certiorari.[77]

The *Dixon* Court noted that there is no federal legislative codification of common law defenses.[78] The Court declined to establish the contours of a duress or necessity defense, and instead presumed as valid the district court's instructions on the elements of the defense.[79] The Court then rejected the defendant's claim that her defense controverted the *mens rea* required for conviction.[80] Rather, the Court reasoned, even if the defendant's "will was overborne" by threats, she still "knew" that she was breaking the law.[81]

Thus, the *Dixon* Court held that the defense of duress, like necessity, might excuse otherwise unlawful conduct; however, the presence of duress

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72. 548 U.S. 1 (2006).

73. *See id.* at 4-5 (assuming existence of federal duress defense).

74. *See id.* at 3-5 (describing facts of case).

75. *See id.* at 4 (stating defendant's duress argument).

76. *See id.* (acknowledging defendant's claim that district court erroneously placed burden of production for defense on defendant).

77. *See id.* (providing procedural posture of case).

78. *See id.* at 5 n.2 ("There is no federal statute defining the elements of the duress defense. We have not specified the elements of the defense . . . ." (citation omitted)).

79. *See id.* (reviewing district court's test). The district court suggested the following test:

> (1) The defendant was under an unlawful and imminent threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury; (2) the defendant had not recklessly or negligently placed herself in a situation in which it was probable that she would be forced to perform the criminal conduct; (3) the defendant had no reasonable, legal alternative to violating the law, that is, a chance both to refuse to perform the criminal act and also to avoid the threatened harm; and, (4) that a direct causal relationship may be reasonably anticipated between the criminal act and the avoidance of the threatened harm.

Id. (citation omitted).

80. *See id.* at 6 (dismissing *mens rea* challenge). Although the Court recognized that § 922(n) does not contain a specific *mens rea* requirement, the Court cited that the corresponding sentencing provision "requires that a violation be committed willfully." *Id.* at 6 n.3. The Court also noted, "[the Government] clearly met its burden when petitioner testified that she knowingly committed certain acts . . . and when she testified that she knew she was breaking the law when, as an individual under indictment at the time, she purchased a firearm." *Id.* at 6.

81. *See id.* (finding that duress did not negate defendant's criminal state of mind).

does not itself controvert the mental culpability element.[82] Further, the Court noted that common law history and legislative silence leaves application of affirmative defenses to the federal courts "as Congress 'may have contemplated' it in an offense-specific context."[83] The *Dixon* Court affirmed the district court's jury instructions, holding that, in the context of firearms offenses, "Congress intended the [defendant] to bear the burden of proving the defense of duress by a preponderance of the evidence."[84]

IV. THE THIRD CIRCUIT TAKES THE LEAD ANNOUNCING A FEDERAL JUSTIFICATION DEFENSE TO FELON-IN-POSSESSION-OF-A-FIREARM CHARGES

Though not the first court confronted with the issue, the Third Circuit is the first to affirmatively recognize a federal justification defense to a felon-in-possession-of-a-firearm offense.[85] In a series of decisions beginning in the early 1990s, the Third Circuit identified the elements of such a defense and allocated the burden of proof.[86] More recently, the Third Circuit revisited justification, further clarifying eligibility for jury instructions and the manner in which defendants must dispossess themselves of a firearm to warrant the justification defense.[87]

A. *The Basics of a Justification Defense in* Paolello *and Its Progeny*

In 1991, the Third Circuit permitted a justification defense to the federal prohibition against felons in possession of firearms under 18 U.S.C.

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82. *See id.* at 6-7 (discussing operation of duress and necessity as affirmative defenses). The Court further explained, "'coercive conditions or necessity negates a conclusion of guilt even though the necessary *mens rea* was present.'" *Id.* at 7 (quoting United States v. Bailey, 444 U.S. 394, 402 (1980)). Nevertheless, neither defense acts to "negate a defendant's criminal state of mind when the applicable offense requires a defendant to have acted knowingly or willfully." *Id.*.

83. *Id.* at 17 (quoting United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483, 491 n.3 (2001)). The Court rejected the defendant's claim that the common law required the Government to disprove duress beyond a reasonable doubt. *See id.* at 8 (assessing burden-of-proof allocation). The Court countered that at common law, "'"all . . . circumstances of justification, excuse or alleviation" rested on the defendant.'" *Id.* (quoting Patterson v. New York, 432 U.S. 197, 202 (1977); 4 WILLIAM BLACKSTONE, COMMENTARIES *201 (1803)).

84. *Id.* at 17.

85. *See generally* United States v. Paolello, 951 F.2d 537 (3d Cir. 1991) (recognizing federal justification defense).

86. For a discussion of the early cases establishing the Third Circuit's justification defense, see *infra* notes 88-102 and accompanying text.

87. For a discussion of the Third Circuit's most recent justification case, see *infra* notes 103-14 and accompanying text.

§ 922(g).[88] In *United States v. Paolello*,[89] the defendant, a stipulated felon, possessed a firearm following a brawl outside a bar.[90] In his defense, the defendant testified that he possessed the gun only after another man punched the defendant's stepson, fired a gun into the air, and pointed the gun at the stepson.[91] The district court denied the defendant's request for jury instructions on justification.[92] Following conviction, he appealed.[93]

The Third Circuit determined that justification might apply as a defense to a felon-in-possession-of-a-firearm charge, provided the defendant establishes:

> (1) he was under unlawful and present threat of death or serious bodily injury;
>
> (2) he did not recklessly place himself in a situation where he would be forced to engage in criminal conduct;
>
> (3) he had no reasonable legal alternative (to both the criminal act and the avoidance of the threatened harm); and

88. *See Paolello*, 951 F.2d at 540 (concluding that justification defense instruction was warranted). In *Paolello*, the Third Circuit addressed the availability of an affirmative justification defense as a hybrid defense growing out of the *Bailey* Court's finding that "'[m]odern cases have tended to blur the distinction between duress and necessity.'" *Id.* at 540 (quoting United States v. Bailey, 444 U.S. 394, 410 (1980)). The federal statute banning felons from possessing firearms, § 922(g), provides: "It shall be unlawful for any person—(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition . . . ." 18 U.S.C. § 922(g) (2006).

89. 951 F.2d 537 (3d Cir. 1991).

90. *See id.* at 538-39 (reviewing facts of case).

91. *See id.* (recounting events precipitating possession). Officers testified at trial to seeing a fight outside of a local bar and hearing an onlooker shout "he's got a gun." *See id.* at 538 (internal quotation marks omitted) (summarizing officers' testimony). The officers further testified to chasing and following the defendant down an alley, yelling "freeze, police," and that upon seeing an officer with weapon drawn, the defendant threw the gun in his hand to the ground, and kept running. *See id.* (internal quotation marks omitted) (reviewing testimony). The defendant presented testimony that while in the bar, he got into an argument with another man, and that as he and his stepson left the man followed them outside and punched the stepson in the face. *See id.* at 539 (internal quotation marks omitted) (reviewing defendant's testimony). The defendant testified that the man "put his hand in the air with a gun and shot it off one time," and that in response, the defendant grabbed at the gun, believing the man was pointing the weapon at his stepson. *Id.* (internal quotation marks omitted). The defendant further testified to grabbing the gun and running, because he "wasn't going to leave it there for him to shoot me with it. That's what I think he was trying to do, get the gun again because we were both scuffling after it." *Id.* (internal quotation marks omitted).

92. *See id.* (noting that defense had already admitted possession in physical sense and that district court instructed that "knowing" possession of firearm does not include possession for "innocent" reason).

93. *See id.* (reviewing procedural posture).

(4) there is a direct causal relationship between the criminal action and the avoidance of the threatened harm.[94]

The court opined that Congress wrote § 922(g) in "absolute terms" and "'sought broadly to keep firearms away from the persons Congress classified as potentially irresponsible and dangerous. These persons are comprehensively barred by the Act from acquiring firearms by any means.'"[95] Nevertheless, the Third Circuit recognized a justification defense under § 922(g), reasoning that Congress legislated ever-mindful of defenses available at common law.[96] The court further noted that a "restrictive" application of the justification defense, requiring that the defendant meet a high burden of proof, best effectuates congressional intent.[97]

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94. *See id.* at 539-40 (discussing rationale underlying adoption of four-part test (citing United States v. Crittendon, 883 F.2d 326, 330 (4th Cir. 1989); United States v. Lemon, 824 F.2d 763, 765 (9th Cir. 1987); United States v. Harper, 802 F.2d 115, 117 (5th Cir. 1986); United States v. Wheeler, 800 F.2d 100, 107 (7th Cir. 1986), *overruled by* United States v. Sblendorio, 830 F.2d 1382 (7th Cir. 1987))). The Third Circuit noted that although duress and justification were historically two distinct defenses, they are presently treated the same. *See id.* at 540 (examining duress and justification defenses (citing United States v. Bailey, 444 U.S. 394, 410 (1980); 1 LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS ¶ 8.06, at 8-22 (1991))). The court then compared the justification defense to the court's arguably "more lenient approach" to duress, which requires that the defendant prove: "(1) an immediate threat of death or serious bodily injury; (2) a well-grounded fear that the threat will be carried out; and (3) no reasonable opportunity to escape the threatened harm." *Id.* (citations omitted). The court further reasoned that, while seemingly less restrictive, the duress test also "embodies the same fundamental principle: 'if there was a reasonable, legal alternative to violating the law, "a chance both to refuse to do the criminal act and also to avoid the threatened harm" the defenses will fail.'" *Id.* (quoting *Bailey*, 444 U.S. at 410; WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 379 (1972)). Thus, the court concluded that, in a criminal case, the justification defense requires proof of the fourth factor—a direct causal relationship. *See id.* (rationalizing causation prong). The court noted, further, that the justification defense is also predicated upon the defendant not having "recklessly" placed himself in a situation where he would have to engage in criminal conduct. *See id.* at 541 (comparing present situation, in which no recklessness was found, to hypothetical where defendant recklessly enters establishment to commit crime and is confronted by armed occupant).

95. *Id.* at 541 (quoting United States v. Barrett, 423 U.S. 212, 218 (1976)).

96. *See id.* (citing *Bailey*, 444 U.S. at 415 n.11 ("Congress in enacting criminal statutes legislates against the background of Anglo-Saxon common law."); United States v. Gray, 878 F.2d 702, 704 n.2 (3d Cir. 1989) (noting Government did "not contest that, if proven in the appropriate case, duress or justification is a complete defense"); United States v. Panter, 688 F.2d 268, 271 (5th Cir. 1982) (same); United States v. Agard, 605 F.2d 665, 667 (2d Cir. 1979) (same)).

97. *See id.* at 541-42 (reviewing other circuits' precedent and adopting restrictive approach (citing United States v. Singleton, 902 F.2d 471, 472-73 (6th Cir. 1990) (holding that interdicted person may possess firearm no longer than absolutely necessary); United States v. Stover, 822 F.2d 48, 50 (8th Cir. 1987) (same); United States v. Vigil, 743 F.2d 751, 756 (10th Cir. 1984) (noting "the purpose of [§ 922] makes it extremely difficult for one to successfully raise the defense of necessity"); United States v. Bifield, 702 F.2d 342, 345-46 (2d Cir. 1983) (limiting

Ultimately, the court held that the jury should have been instructed on justification.[98]

In 2000, the Third Circuit specifically addressed the issue of burden-of-proof allocations for a justification defense to felon-in-possession charges.[99] Mirroring the Supreme Court's approach in *Dixon*, the court in *United States v. Dodd*[100] addressed the burden of proof regarding § 922(g)—the only charge before the court—and found that the defendant bears the burden of production, by a preponderance of the evidence, as a prerequisite to receiving jury instructions on justification.[101] Here, the court concluded that placing the "burden of persuasion on the defendant . . . is constitutionally permissible, consonant with the common law, preferable for practical reasons, and faithful to the strictness of the statute into which we have read this justification defense."[102]

B. *The* Lewis *Court Tightens the Lid on a Federal Justification Defense*

Recently, in 2010, the Third Circuit again considered the criteria required for a defendant to successfully raise a justification defense to a felon-in-possession-of-a-firearm indictment.[103] In *Virgin Islands v. Lewis*, the Third Circuit clarified the requisite showing under the third prong of

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justification defense by requiring that defendant proffer evidence on all elements of defense))).

98. *See id.* at 544 (reversing and remanding case). The court summarized the parties' agreement that, if the court granted a new trial, the defense would carry the burden of establishing the elements of justification, and thereafter the Government would have the burden to rebut the same beyond a reasonable doubt. *See id.* (discussing stipulation). The court, however, noted some doubt regarding whether the arrangement accurately reflected current law, and thus reserved for further briefing on remand regarding the allocation of the burden of proof. *See id.* (responding to stipulation).

99. *See* United States v. Dodd, 225 F.3d 340, 350 (3d Cir. 2000) (affirming that defendant raising justification defense to felon-in-possession charge must prove elements of defense by preponderance of evidence).

100. 225 F.3d 340 (3d Cir. 2000).

101. *See id.* at 350 (noting that "'defendant will usually be best-situated to produce evidence relating to each element of this affirmative defense'" (citation omitted)); *see also* United States v. Dixon, 548 U.S. 1, 17 (2006) (placing burden of production for affirmative defenses on defendant).

102. *Dodd*, 225 F.3d at 350.

103. *See* Virgin Islands v. Lewis, 620 F.3d 359 (3d Cir. 2010) (reviewing justification defense raised against indictment under Virgin Islands Code section 2253(a) for unlawful possession of firearm). Section 2253(a) subjects to criminal sanctions anyone who, "unless otherwise authorized by law, has, possesses, bears, transports, or carries either, actually or constructively, openly or concealed any firearm." V.I. CODE ANN. tit. 14, § 2253(a) (2011). For the purposes of legislative interpretation, and noting a lack of any Virgin Islands case law on point, the Third Circuit affirmed the similarity between the federal felon-in-possession statute, § 922(g), and section 2253(a), concluding "a common-law justification defense likewise applies to unlawful-possession prosecutions in the Virgin Islands." *Lewis*, 620 F.3d at 364 n.5.

Paolello.[104] In *Lewis*, the defendant appealed his conviction for unlawful possession of a firearm following the fatal shooting of a former friend while in the friend's car.[105] The defendant testified at trial that he only possessed the firearm to defend himself, and therefore it was plain error for the district court to fail to give jury instructions *sua sponte* on whether the defendant's possession of the firearm was a legal necessity.[106]

The *Lewis* court determined that the four-part *Paolello* justification test applies with equal force as a defense to the Virgin Islands felon-in-possession statute.[107] The court also affirmed that the justification test should be applied "restrictively," requiring the defendant to "'meet a high level of proof to establish the defense of justification.'"[108] The court further endorsed an additional requirement that "'an interdicted person possess the

104. *See Lewis*, 620 F.3d at 359 (grafting narrow additional requirements onto *Paolello*'s third prong). The *Lewis* court observed that, for the purposes of its analysis, the Virgin Islands statute at issue was "substantially similar" to the federal prohibition under § 922(g). *Id.* at 364 n.5. Thus, this Casebrief extends the *Lewis* court's rationale to § 922(g). For further discussion of the court's treatment of the two statutes, see *supra* note 103.

105. *See Lewis*, 620 F.3d at 364 (reviewing defendant's claim). The defendant originally told hospital personnel and police that his friend had been shot in a drive-by shooting. *See id.* at 362 (discussing facts of case). Upon discovering evidence to the contrary, however, the Government charged the defendant with first-degree murder and unlawful possession. *See id.* (reviewing initial charges). The defendant testified that, a few days prior to the shooting, his friend gave him a drink that made him fall asleep and also sexually assaulted him. *See id.* at 363 (summarizing testimony). The defendant further testified that on the day of the shooting he went to his friend's house to retrieve some personal belongings when his friend pulled out a gun, sprayed shots into the air, and ordered the defendant into a car. *See id.* (discussing events precipitating possession). The defendant claimed that he grabbed for the gun after his friend repeatedly jabbed the gun into the defendant's head. *See id.* (recounting possession). The gun fired several times during the struggle, and ultimately the defendant shot his friend in self-defense. *See id.* (reviewing facts of case).

106. *See id.* at 364 (describing defendant's claim on appeal). At the close of the trial, the defendant specifically requested self-defense jury instructions, but conceded he did not request a justification instruction to the unlawful possession count. *See id.* (summarizing requested instructions). The jury acquitted the defendant of first-degree murder, but convicted him of unlawful possession. *See id.* (noting jury verdict).

107. *See id.* at 364-65 (quoting United States v. Paolello, 951 F.2d 537, 540-41 (1991)). For a discussion of the similarities between the federal and Virgin Islands statutes, see *supra* notes 103-04. The *Lewis* court further noted it would defer to legislative interpretations of the Supreme Court of the Virgin Islands unless manifestly erroneous, but presently would rely upon *Paolello*. *See Lewis*, 620 F.3d at 364 n.5 (relying on Third Circuit case). The court stated:

> We do not mean by our decision today to preclude the Supreme Court of the Virgin Islands from offering its own interpretation of § 2253(a), and whether and under what circumstances a justification defense is available. Until that day comes, however, we decide this case applying our most analogous precedent.

Id.

108. *Lewis*, 620 F.3d at 365 (quoting *Paolello*, 951 F.2d at 542) (citing United States v. Alston, 526 F.3d 91, 94, 95 n.5 (3d Cir. 2008)).

firearm no longer than absolutely necessary.'"[109] Affirming in part the appellate division's analysis, the Third Circuit clarified, "[a] natural and logical corollary to this requirement is that the defendant must dispossess himself of the firearm in an objectively reasonable manner."[110] The court rejected the view that turning the firearm over to the police is "an irreducible minimum" establishing a bright-line requirement, but rather one acceptable "objectively reasonable method" of dispossession.[111]

Thus, the court held, in order to satisfy *Paolello*'s third requirement for a justification instruction, the defendant "(1) must possess the firearm no longer than is absolutely necessary to avoid the imminent threat; and (2) must dispossess himself of the gun in an objectively reasonable manner once the threat has abated."[112] The court concluded, as a matter of law, that the defendant—who testified to throwing the gun into a nearby "garbage pan" to avoid responsibility for the shooting because he feared that no one would believe his story of self-defense—failed to meet the "objectively reasonable" dispossession standard.[113] The court reasoned, "a surreptitious effort to secrete a firearm in order to evade criminal sanction is not a reasonable mode of dispossession. . . . [S]uch conduct cannot satisfy the objective requirement that a defendant 'act in the most responsible manner available under the circumstances.'"[114]

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109. *Id.* at 366 (quoting *Paolello*, 951 F.2d at 541). Other circuit courts have also endorsed the view that a defendant seeking a justification instruction may not possess the firearm any "longer than absolutely necessary." United States v. White, 552 F.3d 240, 247 (2d Cir. 2009); *accord* United States v. Mooney, 497 F.3d 397, 408 (4th Cir. 2007) (permitting justification defense where defendant "did not unnecessarily delay or detour at any point" and because defendant's "manifest intention from seizure to hand-over was the single-minded effort to rendezvous with the police"); United States v. Singleton, 902 F.2d 471, 473 (6th Cir. 1990) (stating defendant claiming necessity defense must "show that he did not maintain possession any longer than absolutely necessary"); United States v. Parker, 566 F.2d 1304, 1305-06 (5th Cir. 1978) (finding defendant ineligible for justification instruction where he kept gun for thirty minutes following attack).

110. *Lewis*, 620 F.3d at 368 (citing United States v. Ricks, 573 F.3d 198, 203 (4th Cir. 2009)).

111. *Compare id.* at 358 (requiring that defendant dispossess himself of firearm in "objectively reasonable manner"), *with* United States v. Al-Rekabi, 454 F.3d 1113, 1123 (10th Cir. 2006) (holding that "[s]ome attempt to place [the] pistol into the hands of the police is an irreducible minimum in evaluating" defendant's entitlement to justification instruction). The *Lewis* court further clarified that the method of dispossession "must be assessed for reasonableness under all relevant circumstances." *Lewis*, 620 F.3d at 369 (citation omitted).

112. *Lewis*, 620 F.3d at 369.

113. *See id.* (applying "objectively reasonable" requirement to facts of case). For a practical discussion of the court's objectively reasonable standard, see *infra* note 164 and accompanying text.

114. *Lewis*, 620 F.3d at 370 (citation omitted). In addition to the defense's failure to meet the requisite evidentiary showing, the court further noted that trial courts are not generally under a duty to raise affirmative defenses on a criminal defendant's behalf *sua sponte*. *See id.* at 371 (declining to reverse for lack of instructions even if defendant had satisfied test); *see also* United States v. Atkins, 487 F.2d 257, 259 (8th Cir. 1973) (finding no plain error when trial court denied to provide

V. THE THIRD CIRCUIT MODELS THE STANDARD FOR A FEDERAL JUSTIFICATION DEFENSE

Supreme Court precedent supports the Third Circuit's application of a federal justification defense to a felon-in-possession-of-a-firearm charge.[115] While the Court has yet to uphold an appeal seeking a jury instruction on justification, the Court has nevertheless explicitly and repeatedly presumed the availability of such a defense.[116] Moreover, the basic four-prong justification test initially announced in *Paolello* is consistent with the test tacitly approved by the Supreme Court in *Dixon*.[117] The *Dodd* court's burden-of-proof allocation—imposing on defendants a burden of production by a preponderance of the evidence—further mirrors the Court's threshold showing required in *Dixon*.[118]

Additionally, the *Lewis* Court's restrictive, case-by-case reasonable dispossession analysis follows the Supreme Court's equitable approach.[119] Faithful to the *Baender* Court's observation, the Third Circuit has interpreted § 922(g) in "a reasonable sense," and has applied the justification defense only to avoid "manifest injustice."[120] For example, in *Paolello*, the Third Circuit permitted a jury justification defense based on substantial evidence that the defendant's firearm possession resulted from extenuating circumstances to which the defendant merely reacted—specifically, by disarming an intoxicated aggressor that had harassed, pursued, and fired a bullet into the air while charging the defendant and his stepson.[121] Importantly, the defendant in *Paolello* offered further testimony that he dispossessed himself once he realized the police had arrived.[122] By contrast, the *Lewis* court denied a justification instruction where the defendant had intentionally misled the police and admitted he had thrown the gun into a

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alibi instruction *sua sponte*, declaring "[a] trial court need not give such an instruction in the absence of a request therefor" (citation omitted)); Roper v. United States, 403 F.2d 796, 798 (5th Cir. 1968) (same); United States v. Sferas, 210 F.2d 69, 71 (7th Cir. 1954) ("[A]ppellate courts will not, generally speaking, pass upon defenses which have not been previously brought to the attention of the trial court." (citation omitted)).

115. For a discussion of Supreme Court precedent supporting the Third Circuit's approach, see *supra* notes 46-84 and accompanying text.

116. For a discussion of Supreme Court jurisprudence presuming a justification defense, see *supra* notes 49-84 and accompanying text.

117. For a discussion of the *Dixon* case and the necessity test, see *supra* notes 72-84 and accompanying text.

118. For a discussion of the *Dodd* burden-of-proof allocation, see *supra* notes 99-102 and accompanying text. For a discussion of the *Dixon* burden-of-proof allocation, see *supra* notes 83-84 and accompanying text.

119. *See, e.g.*, Baender v. Barnett, 255 U.S. 224, 226 (1921) (discussing legislative interpretation canons).

120. *Id.* at 226. For further discussion of the *Baender* decision, see *supra* notes 49-52 and accompanying text.

121. For further discussion of the facts of *Paolello*, see *supra* notes 89-91 and accompanying text.

122. For a discussion of the manner of dispossession in *Paolello*, see *supra* note 91.

dumpster to avoid potential criminal liability.[123] Through its imminence and reasonableness analysis, the Third Circuit's decisions in *Paolello* and *Lewis* demonstrate that the appropriate use of a justification defense can help prevent an otherwise absurd and unjust result.[124]

Consistent with the *Bailey* Court's mandate, a federal justification defense to § 922(g) does not controvert a clear legislative "'determination of values.'"[125] Rather, the Third Circuit's justification jurisprudence is consistent with legislative intent.[126] Absent direct congressional consideration of a justification defense to § 922(g)—unlike the statute at issue in *Oakland Cannabis*—permitting the defense given *Lewis*'s reasonable dispossession requirement reserves the defense for only the most noble of intentions, such as preventing serious bodily harm to oneself or to others.[127] The Third Circuit's justification defense operates only where defendants'

123. For a discussion of the method of dispossession in *Lewis*, see *supra* note 113 and accompanying text.

124. *Compare* Virgin Islands v. Lewis, 620 F.3d 359, 370 (3d Cir. 2010) (denying justification defense where lacking imminence, reasonableness, and continued justification), *with* United States v. Paolello, 951 F.2d 537, 543 (3d Cir. 1991) (permitting justification defense).

125. United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483, 491 (2001) (quoting LAFAVE & SCOTT, *supra* note 71, § 5.4, at 629). *Compare id.* (noting in federal drug statute clear congressional determination that marijuana has no lawful medicinal use), *and* United States v. Dixon, 548 U.S. 1, 13-14 (2006) (reviewing similar felon-in-possession charge and recognizing federal court capacity to apply common law defenses where Congress has been silent), *with Paolello*, 951 F.2d at 543 (permitting justification defense—where elements met—absent evidence of congressional intent to contrary), *and Lewis*, 620 F.3d at 364 n.5, 369 (same).

126. *See generally* David T. Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 CUMB. L. REV. 585 (1987) (examining federal firearm legislation); Lisa Rachlin, Comment, *The* Mens Rea *Dilemma for Aiding and Abetting a Felon in Possession*, 76 U. CHI. L. REV. 1287, 1289-96 (2009) (overviewing congressional regulation of convicted felons' possession of firearms). The United States has a history of denying firearms to felons. *See* Rachlin, *supra*, at 1289 (noting historical trend of restricting felons from obtaining firearms). Congress specifically enacted § 922(g) in the Omnibus Crime Control and Safe Streets Act of 1968, however, to target specific concerns about "'a widespread traffic in firearms moving in or otherwise affecting interstate or foreign commerce.'" *Id.* at 1294 (quoting Omnibus Crime Control and Safe Streets Act, Pub. L. 90-351, June 19, 1968, 82 Stat. 197, 225). Congress further found that "'the ease with which any person can acquire firearms other than a rifle or shotgun (including criminals . . .) is a significant factor in the prevalence of lawlessness and violent crime in the United States.'" *Id.* at 1294-95 (quoting Omnibus Crime Control and Safe Streets Act, 82 Stat. at 225); *see also id.* at 1295 (describing Congress's findings). *But see* Stephen S. Schwartz, Comment, *Is There A Common Law Necessity Defense in Federal Criminal Law?*, 75 U. CHI. L. REV. 1259, 1284 (2008) (arguing federal necessity defense is not applicable for regulatory crimes).

127. *Compare Lewis*, 620 F.3d at 362 (denying justification defense where defendant threw weapon into dumpster and evaded police), *with Paolello*, 951 F.2d at 537 (permitting justification defense where defendant possessed gun from another man who had threatened defendant and defendant dispossessed himself when police arrived). For a discussion of the Supreme Court's decision in *Oakland Cannabis*, see *supra* notes 66-71 and accompanying text.

actions are of self-preservation, rather than criminal perpetration.[128] Thus, such a restrictive justification defense preserves Congress's overarching intent to keep firearms out of the hands of convicted felons so as to prevent further violent crimes.[129]

Further, most other circuits have either adopted or concurred with the Third Circuit's justification approach.[130] The First, Fourth, Sixth, Ninth, and Eleventh Circuits have specifically recognized a federal justification defense to a felon-in-possession-of-firearm charge under § 922(g).[131] The Second, Fifth, Seventh, and D.C. Circuits have further

128. For a discussion comparing the exculpatory facts found in *Paolello* with the facts in *Lewis* that the court deemed to be lacking, see *supra* note 127.

129. For a discussion of congressional intent, see *supra* note 126.

130. For a discussion of circuit court justification defense jurisprudence, see *infra* notes 130-36 and accompanying text. Other circuits initially avoided squarely addressing the availability of a federal justification defense to a felon-in-possession-of-a-firearm charge; these cases simply declined to reach the issue of justification for want of supporting evidence. *See, e.g.*, United States v. Crittendon, 883 F.2d 326, 330 (4th Cir. 1989) (declining to rule on general availability of justification defense to federal felon-in-possession-of-firearm charge, and finding defense unavailable because possessing gun for protection does not meet "imminent danger" requirement); United States v. Stover, 822 F.2d 48, 50 (8th Cir. 1987) (holding that it was unnecessary to address availability of justification to felon-in-possession-of-firearm charge and finding that defendant maintained possession of gun after "imminent danger" subsided); United States v. Lemon, 824 F.2d 763, 765 (9th Cir. 1987) (discussing required showing to "interpose" justification defense onto federal felon-in-possession-of-firearm statute, but affirming that there was insufficient evidence to entertain defense). Notwithstanding these circuits' hesitancy to affirmatively acknowledge a federal justification defense, the courts nevertheless acknowledge the trend in other circuits to recognize the defense when sufficiently supported by the evidence. *See, e.g.*, Unites States v. Mooney, 497 F.3d 397, 403 (4th Cir. 2007) ("Every circuit to have considered justification as a defense to a prosecution under 18 U.S.C. § 922(g) has recognized it." (citations omitted)). *But see, e.g.*, United States v. Patton, 451 F.3d 615, 637-38 (10th Cir. 2006) (parroting *Dixon* Court rationale, assuming—without deciding—necessity defense was available to felon in possession of unlawful body armor, but affirming there were insufficient facts to support jury instruction).

131. *See Lewis*, 620 F.3d at 364 (acknowledging availability of justification defense to felon-in-possession-of-firearm charge); *Paolello*, 951 F.2d at 540 (same); *see also* United States v. Leahy, 473 F.3d 401, 404 (1st Cir. 2007) (affirming federal justification defense available in felon-in-possession cases, "which typically encompass duress, necessity, and self-defense," but finding defendant failed to demonstrate sufficient evidence supporting defense); *Mooney*, 497 F.3d at 403 (implicitly recognizing federal justification defense by reversing and remanding conviction for felon-in-possession-of-firearm, stating "if [the defendant] were able to present the same facts at trial, the trial court would be required . . . to submit a justification defense to the jury and . . . the jury would likely consider it favorably"); United States v. Deleveaux, 205 F.3d 1292, 1294 (11th Cir. 2000) (finding defendant failed to meet burden of proof in establishing elements by preponderance of evidence, but nevertheless holding "justification is available as an affirmative defense to [§ 922(g), a] strict liability offense"); United States v. Gomez, 92 F.3d 771, 777-78 (9th Cir. 1996) (reversing conviction for failure to include jury instruction on necessity where defendant, prior to committing violation, repeatedly sought government protection from resulting threats against his life after government had revealed his status as confidential informant); United States v. Singleton, 902 F.2d

recognized the validity of a justification defense, more generally, in federal weapons violations.[132]

Notwithstanding whether the circuit has specifically recognized a federal justification defense, most circuits agree with the Third Circuit's justification test.[133] Other circuits have also generally interpreted this test in a restrictive manner.[134] For example, the Fifth Circuit determined that a merely generalized fear does not support the defense's "imminence" requirement.[135] Further, in the Seventh Circuit, as in the Third Circuit, pos-

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471, 473 (6th Cir. 1990) (recognizing affirmative defense of justification in federal felon-in-possession-of-firearms cases, nevertheless affirming denial of jury instruction because defendant failed to demonstrate sufficient evidence supporting defense). For a further discussion of *Paolello* and *Lewis*, see *supra* notes 88-114 and accompanying text.

132. *See* United States v. Mason, 233 F.3d 619, 621 (D.C. Cir. 2000) (recognizing innocent possession defense to § 922(g) charge); United States v. Perez, 86 F.3d 735, 737 n.3 (7th Cir. 1996) (noting that, although "defense of necessity will rarely lie in a felon-in-possession case," such defense is valid where "ex-felon, not being engaged in criminal activity, does nothing more than grab a gun with which he or another is being threatened"); United States v. Gant, 691 F.2d 1159, 1161 (5th Cir. 1982) (recognizing general availability of common law necessity defense to felon-in-possession-of-firearm charge, though denying on insufficient evidence); United States v. Panter, 688 F.2d 268, 269, 271, 272 n.7 (5th Cir. 1982) (reversing conviction for illegal possession of firearm because self-defense and necessity affirmative defenses were not allowed at trial); United States v. Agard, 605 F.2d 665, 667 (2d Cir. 1979) (same).

133. *See Paolello*, 951 F.2d at 540 (citing *Crittendon*, 883 F.2d at 330 (recognizing four-part justification test to felon-in-possession-of-firearm charge)), *overruled by* United States v. Sblendorio, 830 F.2d 1382 (7th Cir. 1987); *accord Leahy*, 473 F.3d at 404; *Delevaux*, 205 F.3d at 1297; *Singleton*, 902 F.2d at 472-73. *But see Patton*, 451 F.3d at 638 (discussing, without adopting, less restrictive three-prong test, omitting requirement that defendant may not recklessly place himself or herself in situation necessitating unlawful possession). The *Patton* court reviewed the "traditional" necessity defense, requiring only: "'(1) there is no legal alternative to violating the law, (2) the harm to be prevented is imminent, and (3) a direct, causal relationship is reasonably anticipated to exist between the defendant's action and the avoidance of the harm.'" *Id.* (citation omitted).

134. *See Deleveaux*, 205 F.3d at 1297 (concurring with other circuits that defense should be available "in only extraordinary circumstances" (citing *Paolello*, 951 F.2d at 542)); *Perez*, 86 F.3d at 737 (noting that necessity defense "will rarely lie in a felon-in-possession case" and "only in the most extraordinary circumstances" (citations omitted)); *Singleton*, 902 F.2d at 472 ("The justification defense for possession of a firearm by a felon should be construed very narrowly."). The *Perez* court offered a helpful hypothetical characterization of the facts expected in order to succeed on a justification defense, noting: "The defense of necessity will rarely lie in a felon-in-possession case unless the ex-felon, not being engaged in criminal activity, does nothing more than grab a gun with which he or another is being threatened . . . ." *Perez*, 86 F.3d at 737 (citations omitted). For further practical examples of how courts analytically apply a restrictive approach to evidence required to support justification, see *infra* notes 135-36 and accompanying text.

135. United Sates v. Harper, 802 F.2d 115, 118 (5th Cir. 1986) (noting that, notwithstanding earlier threats, justification could not apply because at time defendant purchased weapon he was not "in danger of imminent bodily harm").

sessing the weapon once the threat has subsided nullifies the defendant's entitlement to a justification instruction.[136]

Moreover, recognizing a federal justification defense to a felon-in-possession charge is consistent with common law and modern policy goals.[137] The Third Circuit's four-prong test preserves the utilitarian common law view that punishment is "groundless" where an actor violates the law to prevent a greater harm.[138] The *Lewis* test is also supported by the MPC's codification of a choice-of-evils provision.[139] Further, a federal justification defense is in harmony with modern penal policy choices, as the majority of states recognize such a defense.[140]

Pursuant to the Third Circuit's duty to act as a faithful servant of Congress—and to judge pursuant to interpretative guidance from the Supreme Court—the *Lewis* court best fulfills its role by recognizing a federal justification defense and precluding an otherwise absurd application of § 922(g).[141] The Third Circuit's justification doctrine effectuates the modern Supreme Court understanding of penal theory that criminal liability should only punish the concurrence of "'an evil-meaning mind [and] evil-doing hand.'"[142] Specifically, the Supreme Court has recognized a citizen's right to possess a firearm to protect oneself and the welfare of others as an overarching societal value—a "core lawful purpose."[143]

136. *See* United States v. Pirovolos, 844 F.2d 415, 421 (7th Cir. 1988) (noting that justification protects defendant "'only for possession during the time he is endangered,'" and that possession thereafter remains violation (quoting *Panter*, 688 F.2d at 272)). For further discussion of other circuits' agreement with the Third Circuit's reasonable dispossession requirement in *Lewis*, see *supra* note 109.

137. For a discussion of how the justification defense precludes absurd and unjust results, see *infra* notes 138-42 and accompanying text.

138. For a discussion identifying the policy goals of duress and necessity, see *supra* notes 30-38 and accompanying text. For further discussion on utilitarian influences on modern penal law, see *supra* notes 6-9 and accompanying text.

139. For a discussion of MODEL PENAL CODE § 3.02, see *supra* notes 39-41 and accompanying text.

140. For discussion of state ratification of a necessity, justification, or choice-of-evils defense, see *supra* notes 42-45 and accompanying text.

141. For a discussion of the absurdity doctrine, see *supra* notes 10-11 and accompanying text. For a discussion of statutory interpretation canons used by the Supreme Court, see *supra* notes 49-52 and accompanying text.

142. United States v. Bailey, 444 U.S. 394, 402 (1980) (quoting Morissette v. United States, 342 U.S. 246, 251 (1952)).

143. *See* District of Columbia v. Heller, 554 U.S. 570, 630 (2008) (announcing individual right to bear arms under Second Amendment); *see also* McDonald v. Chicago, 130 S. Ct. 3020, 3050 (2010) (incorporating via Fourteenth Amendment individual right to bear arms for self-defense). The *Heller* Court's observation that "Americans understood the 'right of self-preservation' as permitting a citizen to 'repe[l] force by force' when 'the intervention of society in his behalf, may be too late to prevent an injury'" reflects society's paramount value of preserving human life. *Heller*, 554 U.S. at 595 (quoting 1 BLACKSTONE, *supra* note 83, at *145-46, *146 n.42). The Court, however, did observe that the right to bear arms is not "unlimited," and is not "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* at 626. While not invalidating the general applicability of felon-in-possession-of-firearms statutes, including § 922(g),

Further, the Court recognizes the paramount value society places on human life.[144] The Third Circuit's justification defense prevents criminalization under § 922(g) where temporary possession is the least harmful alternative with which an otherwise blameless actor is faced.[145] Ultimately, "common sense, principles of justice, [and] utilitarian considerations" warrant *Lewis*'s narrow justification defense to § 922(g).[146]

VI. JUSTIFICATION FOR THIRD CIRCUIT PRACTITIONERS

Third Circuit criminal law practitioners should anticipate an increase in justification defenses to felon-in-possession charges.[147] Defense attorneys must nevertheless prepare their clients for reality: the Third Circuit's justification defense is very narrow.[148] In order to successfully plead a justification defense in the Third Circuit, litigators must bear in mind the following five issues: the burden-of-proof allocation, the defendant's role in the event giving rise to a justification defense, the duration of the defendant's possession of the firearm, the defendant's method of dispossessing himself of the firearm, and a request for jury instructions.[149]

First, the defense must prove, by a preponderance of the evidence, each element of the *Lewis* test.[150] The prosecution need not refute such a defense as prerequisite to proving the elements of a felon-in-possession charge.[151] Once the defense has met its initial burden, however, the burden shifts to the prosecution to rebut the evidence beyond a reasonable

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characterizing self-protection as a "core lawful purpose" further supports the availability of a justification defense where a felon possesses a firearm only for a limited duration and for the explicit purpose of preventing a greater harm, namely preventing imminent and serious bodily harm to himself or others. *See id.* at 630 (valuing right to defend oneself).

144. *See Heller*, 544 U.S. at 594-95 (commenting on importance of "'right of self-preservation'" (quoting 1 BLACKSTONE, *supra* note 83, at *145, 146 n.42) (citing WILLAM ALEXANDER DUER, OUTLINES OF THE CONSTITUTIONAL JURISPRUDENCE OF THE UNITED STATES 31-32 (1833))).

145. For a discussion of the narrow application of the Third Circuit's justification rationale, see *supra* notes 88-124 and accompanying text.

146. *See* LAFAVE, *supra* note 30, at 290 (discussing rationale for necessity defense).

147. For further discussion of the increased use of the justification defense in modern case law, see *supra* notes 130-34 and accompanying text.

148. For a discussion of the strictures of justification, see *supra* notes 97-98, 108-109, and accompanying text.

149. For further discussion of each of these issues, see *infra* notes 150-71 and accompanying text.

150. For a discussion of the burden-of-proof allocation in the Third Circuit's justification defense, see *supra* note 99-102 and accompanying text.

151. *See* United States v. Dodd, 225 F.3d 340, 350 (3d Cir. 2000) (casting burden of production on defense).

doubt.[152] Thus, defense attorneys must plead sufficient facts to meet the burden of production and introduce a necessity theory at trial.[153]

Second, criminal litigators on both sides must pay close attention to the underlying facts precipitating the offense.[154] When analyzing a justification defense, the Third Circuit has responded most favorably to evidence indicating that the defendant acted to protect himself or others from serious harm.[155] Demonstrating that the defendant was not the first aggressor further validates such a defense.[156] Defense attorneys should seek to highlight the dilemma with which the defendant was faced: emphasize that temporary possession was the substantially lesser evil than the alternative—grievous and imminent harm.[157] Prosecutors, on the other hand, should demonstrate the lawful alternatives to possession and also seek to uncover ulterior motivations for possession.[158]

Third, the Third Circuit requires a close nexus between the imminence of necessity and the defendant's possession.[159] Such necessity must last for the entire duration of the defendant's possession.[160] Thus, defense attorneys must offer evidence demonstrating both the necessity precipitating the defendant's initial possession, as well as facts justifying the defendant's continued possession until disarmament.[161] Prosecutors

152. *See id.* (noting final burden of proof beyond reasonable doubt remains with prosecution to convict).

153. *See id.* (holding that defendant's pleading of sufficient facts to warrant justification defense is prerequisite burden).

154. For a discussion demonstrating the importance of facts in justification defense cases, see *supra* notes 121-25 and accompanying text.

155. *See generally* United States v. Paolello, 951 F.2d 537 (3d Cir. 1991) (permitting justification where defendant possessed firearm defensively). For further discussion of the facts of *Paoello,* see *supra* notes 90-91 and accompanying text.

156. *See, e.g., Paolello,* 951 F.2d at 538-39 (observing that defendant was first to leave and that defendant possessed firearm only after he was pursued and threatened).

157. *See, e.g., id.* at 542 (permitting justification because defendant "had well-grounded fear that [the] threat would be carried out," and possessed firearm only to avoid being shot or his stepson being shot).

158. *See, e.g.,* Virgin Islands v. Lewis, 620 F.3d 359, 370-71 (3d Cir. 2010) (denying justification, even though possession may have been defensive, because defendant dispossessed himself in manner suggesting that avoiding liability was his primary motivation).

159. *See, e.g., id.* at 365 (requiring "unlawful and present threat of death or serious bodily injury" and "causal relationship" between possession and "avoidance of the threatened harm" (citing *Paolello,* 951 F.2d at 540-41)).

160. *See, e.g., id.* at 366 (requiring "'interdicted person possess the firearm no longer than absolutely necessary'" (quoting *Paolello,* 951 F.2d at 541)).

161. *See, e.g., Paolello,* 951 F.2d at 542 (permitting justification instruction where defendant took gun, ran away from assailant, and dispossessed himself when police arrived).

should seek to demonstrate that the duration of possession was unnecessary and lasted after the alleged threat had subsided.[162]

Fourth, Third Circuit courts will deny a justification defense if a defendant dispossesses himself of the firearm in a manner suggesting an intent to avoid criminal liability.[163] While not requiring that a defendant intend to and subsequently turn the firearm directly over to the police per se, the court will consider any facts demonstrating the defendant's attempt to mislead law enforcement "unreasonable under the circumstances," thus rendering a justification defense unavailable.[164] Defense attorneys must address the defendant's manner of dispossession, bearing in mind that a generalized fear of inculpating oneself will never suffice to explain why a defendant disposed of a firearm in a manner that intentionally diverts a criminal investigation.[165] Alternatively, prosecutors should exploit weak-

162. *See, e.g., id.* (observing that if prosecution demonstrated defendant had opportunity to stop running and disarm himself earlier, it would have "severely undercut [defendant's] justification defense").

163. *See, e.g., Lewis*, 620 F.3d at 367 (denying justification in part based on defendant's testimony that he possessed firearm "to hide it and avoid responsibility for the shooting" (internal quotation marks omitted)).

164. *See id.* at 370 (explaining judge's role as gatekeeper and noting that "[w]e have little difficulty holding that a surreptitious effort to secrete a firearm in order to evade criminal sanction is not a reasonable mode of dispossession[;] . . . such conduct cannot satisfy the objective requirement that a defendant 'act in the most responsible manner available under the circumstances'" (quoting United States v. Al-Rekabi, 454 F.3d 1113, 1123 (10th Cir. 2009))). Defense attorneys should note the court's discussion addressing the defendant's claim of a "Hobson's choice": either dispossess himself instantaneously and risk a later judicial determination that the manner was unreasonable, or wait to dispossess himself of the gun to the police and face a later determination that he waited too long to do so. *See id.* at 369 (describing defendant's alleged dilemma). The court rejected the defendant's abstract argument as without merit on the facts of his case. *See id.* (declining to accept defendant's contention). Nevertheless, the court's construction of "reasonable dispossession" suggests only a limited willingness to treat possession as reasonable where a defendant—rather than dispossessing himself instantaneously—maintains possession longer than absolutely necessary in order to turn the firearm over to the police. *See id.* at 368 (rejecting "bright-line rule" that only reasonable manner of dispossession is to police, while discussing "parameters" of conduct demonstrating defendant possessed firearm "no longer than absolutely necessary"). To illustrate, the court cited other circuit cases. *See id.* (citing United States v. Mooney, 497 F.3d 397, 408 (4th Cir. 2007) (granting justification instruction where defendant "did not unnecessarily delay or detour at any point" in dispossessing himself of gun, and because his "manifest intention from seizure to hand-over was the single-minded effort to rendezvous with the police"); United States v. Singleton, 902 F.2d 471, 473 (6th Cir. 1990) (holding defendant must "show that he did not maintain possession any longer than absolutely necessary" (citation omitted)); United States v. Parker, 566 F.2d 1304, 1305-06 (5th Cir. 1978) (denying justification instruction where defendant retained possession of gun for thirty minutes after being attacked in his home)).

165. *See Lewis*, 620 F.3d at 369 (holding defendant cannot intentionally mislead law enforcement and qualify for justification instruction).

nesses in the facts to demonstrate the defendant's paramount concern was to avoid liability.[166]

Lastly, to introduce a necessity theory, defense attorneys must specifically request a jury instruction on justification.[167] The Third Circuit will not require a trial court to issue such an instruction *sua sponte*, even if substantiated by the evidence.[168] Nevertheless, the Third Circuit has yet to find a defense attorney's failure to raise such a defense reversible error.[169] Because pleading the defense essentially requires admitting possession, such a strategy may be risky where adverse facts render a successful justification defense unlikely.[170] Therefore, defense attorneys should accumulate and carefully consider all the evidence, as well as the extensive requirements to successfully plead a justification defense, before committing to such a tactical approach.[171]

VII. AND SO IT GOES . . .

Common law defenses are a fundamental part of modern criminal law.[172] The Supreme Court has observed that Congress legislates against the backdrop of common law.[173] While Congress is vested with the au-

166. *See id.* at 376-78 (discussing government's interrogation eliciting testimony that defendant threw gun in "garbage pan" because he feared he would be criminally implicated).

167. *See id.* at 371 n.10 ("[T]rial courts generally are under no duty to raise affirmative defenses on behalf of a criminal defendant."). For alternate Third Circuit jury instructions, see Comm. on Model Criminal Jury Instructions Within the Third Circuit, MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE THIRD CIRCUIT § 6.18.922G-1 (2008).

168. *See Lewis*, 620 F.3d at 371 (noting *sua sponte* denial does not rise to level of "plain error").

169. *See id.* (reviewing defendant's claims that counsel was constitutionally deficient). In *Lewis*, the court held that the defendant's claim failed as a matter of law because defense counsel "cannot be ineffective for failing to request an instruction to which [the defendant] was not entitled." *Id.* at 372. The court also noted that such claims are generally not reviewed on direct appeal, and further that defense attorneys must make strategic choices. *See id.* at 370 n.10 (quoting United States v. Van Kirk, 935 F.2d 932, 934 (8th Cir. 1991), for proposition that "a competent defense lawyer could well have concluded that urging [the] defense . . . would have undermined the effort to avoid all the charges on the ground that the defendant was simply not guilty").

170. *See generally* United States v. Dixon, 548 U.S. 1, 17 (2006) (noting justification requires defendant to admit liability for possession); *Lewis* 620 F.3d at 369 (same); United States v. Paolello, 951 F.2d 537, 542 (3d Cir. 1991) (same).

171. *See* United States v. Al-Rekabi, 454 F.3d 1113, 1124 (10th Cir. 2006) ("A claim of necessity may be little more than an *ex-post* attempt by defense counsel to exculpate a client. Such a claim is easily made and so must be factually justified."). For further discussion on factors practitioners should consider, see *supra* notes 148-70 and accompanying text.

172. *See Dixon*, 548 U.S. at 17 (noting that common law history and legislative silence leaves to courts application of affirmative defenses "as Congress may have contemplated it in an offense-specific context").

173. *See* United States v. Bailey, 444 U.S. 397, 415 n.11 (1980) ("Congress in enacting criminal statutes legislates against a background of Anglo-Saxon common

thority to enact the laws, the courts are vested with the duty of interpreting these laws in light of common sense and reason, and not in a manner that works "manifest injustice."[174]

The Third Circuit's recognition of a narrow justification defense to § 922(g) prevents an otherwise unintended and absurd application of the felon-in-possession prohibition.[175] The Third Circuit's approach has already begun to proliferate through the other circuits.[176] Thus, a federal justification defense burgeons, firmly rooted in the traditional maxim that "necessity introduces a privilege with respect to private rights."[177]

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law." (citation omitted)); *accord Paolello*, 951 F.2d at 541 (citing Supreme Court and circuit precedent).

174. Baender v. Barnett, 255 U.S. 224, 226 (1921) (advocating reasonable statutory interpretations); *see also* Manning, *supra* note 10, at 2394 (discussing absurdity doctrine).

175. For a discussion of the propriety of the Third Circuit approach, see *supra* notes 115-46 and accompanying text.

176. For discussion of approaches adopted by other circuits that are similar to the Third Circuit's approach, see *supra* notes 109, 130-36, and accompanying text.

177. *See* BACON, *supra* note 1, at 30 (expressing fundamental principle of necessity).